238. *Video Programming Providers*: Open video systems are an entirely new framework for delivering video programming to consumers. No open video systems have yet been certified to operate. Therefore, it is not possible at this time to estimate the size or number of video programming providers that may seek capacity on open video systems. We anticipate that two types of video programming providers may arise: (1) video programming providers seeking to utilize an open video system to offer a package of individual programming services via open video systems to subscribers; and (2) providers seeking to offer only one programming service. It is not possible to estimate the impact on or the number of video programming providers in the first category because no such entities exist. With respect to the second category, however, we believe that small cable programming services may provide a reasonable substitute. The Census Bureau category most similar to cable programming services is "motion picture and video tape production." *See* SIC Code 7812. Under this category, entities with less than $21.5 million in annual receipts are defined as small motion picture and video tape production entities. 13 C.F.R. § 121.201. There are a total of 7,265 motion picture and video tape production entities; of those, 7,002 have annual receipts of less than $24.5 million. The figures are not broken down further. Thus, we estimate that approximately 7,000 small cable programming services, or video programming providers, may be affected by the rules adopted in this Order. In addition, we note that the Census Bureau data does not reflect a likely significant number of small, independent motion picture and video tape production companies. Such companies may seek to become video programming providers on open video systems, although it is not possible at this time to estimate this number because no publicly available data is available that is specific to such entities. We therefore estimate that a minimum of 7,000 small cable programming services, or video programming providers, may be affected by this rule.

239. *Reporting, Recordkeeping and Other Compliance Requirements.* The following addresses the requirements of regulations adopted, amended, modified or clarified on reconsideration in the *Third Report and Order and Second Order on Reconsideration.*

1. *Affiliate.* In the *Third Report and Order,* the Commission adopts a definition of "affiliate" that will impact open video system operators and their affiliates, including open video system operators that are small entities. A primary effect of this rule concerns situations where demand for carriage exceeds the open video system's channel capacity. In such situations, the open video system operator and its affiliates are prohibited from selecting the video programming services for carriage on more than one-third of the activated channel capacity on its system.[547]

2. *Certification.* We revise FCC Form 1275 to require that applicants to become open video system operators, including applicants that are small businesses, list the names of the local communities in which they intend to operate.[548] An applicant will have already identified

[547] *See* Section II., above.

[548] *See* Section III.B., above.

the local communities in which it intends to operate prior to preparing the form. Listing the names of the communities will neither require any specialized skills nor impose significant new burdens.

3. *Service of FCC Form 1275.* We modify our regulations to require that an open video system applicant, including those that are small entities, serve a copy of its FCC Form 1275 on all affected local communities on or before the date it is filed with the Commission.[549] An applicant will have already prepared the form for submission to the Commission. Therefore, merely serving the form on all affected local communities will not require any specialized skills.

4. *Ad Avails.* We modify our regulations to require that advertising availabilities ("ad avails") associated with a programming service carried by both the open video system operator or its affiliated video programming provider and an unaffiliated provider must be shared in an equitable manner.[550] This may impose burdens on open video system operators, including those that are small entities, because an operator must now share the revenues or other benefits of such ad avails with unaffiliated entities, rather than keeping all such revenues. In certain instances, this approach may impose burdens on video programming providers that may have been able to keep all such revenues. We find that implementing this approach requires no specialized skills.

5. *Gross Revenues Fee.* We modify our regulations to permit an open video system operator to recover the gross revenues fee from all video programming providers using the platform on a proportional basis as an element of the carriage rate.[551] This approach may impose additional burdens on video programming providers, including those that are small entities, because the carriage rate may be increased to reflect the open video system operator's gross revenues fees. We find that implementing this approach requires no specialized skills.

6. *Matching of PEG Access Obligations.* We modify our regulations to require open video system operators, in the absence of a negotiated agreement, to match, rather than share, all public, educational and governmental ("PEG") access financial contributions of the local cable operator.[552] This matching requirement could result in additional financial burdens on open video system operators, including those that are small entities, because matching the cable operator's PEG access financial contributions will be more costly in many situations than merely sharing the cable operator's contributions towards PEG access services, facilities and equipment, as permitted under the previous approach. We find that implementing this approach requires no specialized skills.

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[549] *See* Section III.B., above.

[550] *See* Section III.C., above.

[551] *See* Section III.E., above.

[552] *See* Section III.F., above.

7. *LFA Election.* We modify our regulations so that, in areas where a cable franchise previously existed, such as where a cable operator is able to convert its cable system to an open video system, the local franchise authority will be permitted, absent a negotiated agreement, to elect either: (1) to maintain the previously existing PEG access requirements; or (2) to have the open video system operator's PEG access obligations determined by comparison to the nearest operating cable system that has a commitment to provide PEG access and that serves a franchise area with a similar population size. Every 15 years thereafter, the LFA is permitted to make a similar election.[553] This requirement could impose new burdens on open video system operators, including those that are small entities, because an operator's PEG access obligations may be increased when compared to the nearest operating cable system that has a commitment to provide PEG access and that serves a franchise area with a similar population size. In addition, these obligations may be subject to increases every 15 years, rather than frozen in perpetuity.

8. *Must-Carry/Retransmission Consent Election.* The order requires a broadcast station to make the same election for open video systems and cable systems in the same geographic area, unless the overlapping open video system is unable to deliver appropriate signals in conformance with the broadcast station's elections for all cable systems serving the same geographic area. We estimate that this requirement will have an impact on some broadcast stations. We anticipate that this requirement will not require any more professional skills than are required to make such elections and notify operators in the context of cable systems.

9. *Must-Carry Copyright.* The order requires an open video system operator to pay for any additional copyright fees incurred as a result of carrying a local signal outside of its local service area.[554] We estimate that this requirement may affect a limited number of large open video system operators. We anticipate that distribution of signals outside of a local market will most likely occur on large systems that overlap several markets. We also anticipate that many open video systems will have the ability to limit distribution of signals to local markets. If additional copyright fees are incurred by an open video system operator, we do not anticipate that the operator will have to use any professional skills beyond those already used to comply with the copyright rules.

10. *Sports Exclusivity.* The order holds an open video system operator responsible for any violation of our sports exclusivity rules.[555] We estimate that this requirement will have an impact on open video system operators and programmers. We do not anticipate that this rule will require the use of any additional professional skills beyond the skills normally required for a programmer to assess the validity of exclusive rights to sports programming.

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[553] *See* Section III.F.

[554] *See* Section III.F.2, above.

[555] *See* Section III.F.4, above.

11. *Navigational Devices.* In this Order, we allow open video system operators to permit programming providers, including those affiliated with the open video system, to use their own navigational devices, subject to certain conditions.[556] If the open video system operator permits programming providers to use their own navigational devices, the open video system operator must provide a nondiscriminatory guide or menu that all programming providers must carry, showing all programming available on the systems. We estimate that the requirement could result in additional burdens on open video system operators including small open video system operators. We find that implementing this approach requires no specialized skills.

12. *Dispute Resolution.* We clarify our regulations to require that the preliminary rate estimate provided by an open video system operator to video programming providers must include, upon request, all information needed to calculate the average rate paid by unaffiliated programming providers receiving carriage on the system, including the information needed for any weighting of the individual carriage rates that the operator has included in the average rate.[557] This clarification may impose new burdens on open video system operators, including those that are small entities, because an open video system operator may have to prepare this information earlier than under the previous approach. This will occur because an operator must now provide a video programming provider with the information upon request, rather than after a complaint is filed. On the other hand, an open video system operator is likely to have prepared such information in order to determine carriage rates to be charged. In such situations, the rule clarification may not impose significant new burdens because an open video system operator merely will have to provide a video programming provider with existing material, which should not require any specialized skills.

240. *Steps Taken to Minimize the Significant Economic Impact on Small Entities and Significant Alternatives Rejected.* This section analyzes the impact on small entities in the contexts of regulations adopted, amended, modified or clarified in this *Third Report and Order and Second Order on Reconsideration.*

1. *Affiliate.* In the *Third Report and Order and Second Order on Reconsideration* with respect to the definition of affiliate, we adopt the attribution standard that applies in the cable program access context. The factual, legal and policy reasons are set forth in Section II, above. The definition of affiliate we adopt will create opportunities for unaffiliated programmers, many of which may be small entities, by promoting diversity of video programming sources, and is intended to reduce the likelihood that open video system operators will discriminate against or otherwise disfavor unaffiliated programming providers, including small unaffiliated programmers. In addition, by adopting consistent standards, we reduce the burdens associated with determining whether a video programming provider will be considered an affiliate of the open video system operator for one purpose but not for the other. We rejected several alternatives to this definition

[556] *See* Section III.G., above.

[557] *See* Section III.H., above.

of affiliate, as described in Section II, above.

2. *Certification.* Requiring applicants to list the names of all local communities in which they intend to operate will not impose significant new burdens on applicants for the reasons stated above and will reduce burdens on the affected local communities, including those that are small entities. This approach will also reduce the burdens on open video system operators by reducing the potential for confusion over which local communities will be served by the open video system.

3. *Service of FCC Form 1275.* Requiring service of FCC Form 1275 on local communities, as described above, will impose only minimal new burdens on open video system operators, including those that are small entities. These burdens are outweighed by the benefits to local communities, such as ensuring that a local community without ready access to the Internet or the Commission's Public Notices will be made aware of the applicant's filing. The factual, legal and policy reasons are described in Section III.B. This approach will reduce burdens on local communities by enhancing their ability to become aware of an open video system's establishment. This approach will also reduce the burdens on open video system operators by reducing the potential for confusion over which local communities will be served by the open video system. The primary significant alternative is not requiring such service, but as stated, we find that the benefits to local communities outweigh any minimal burdens of complying with this rule.

4. *Ad Avails.* Requiring that advertising availabilities ("ad avails") associated with a programming service carried by both the open video system operator or its affiliated video programming provider and an unaffiliated provider be shared in an equitable manner may impose burdens on open video system operators, including those that are small entities. Such burdens are described in the preceeding section of this FRFA. However, we find these burdens are outweighed by the benefits of this requirement, which include providing unaffiliated video programming providers with an equitable share of income from ad avails and preventing the open video system operator or its affiliate from having a significant financial advantage over unaffiliated video programming providers.[558] The factual, legal and policy reasons are described in Section III.C. We reduce the burdens on open video system operators by specifying examples of acceptable methods of sharing ad avails, including apportioning the relevant revenues or apportioning the rights to sell the avails themselves. The primary significant alternative is maintaining our current rules which do not require such sharing; however, as stated, we find that the benefits to unaffiliated video programming providers outweigh the burdens of complying with this rule.

5. *Gross Revenues Fee.* Modifying our rules to permit an open video system operator to recover the gross revenues fee from all video programming providers using the platform on a proportional basis as an element of the carriage rate may impose additional burdens

[558] *See* Section III.C., above.

on video programming providers, including those that are small entities. However, we find that these burdens, as described above, are outweighed by the benefits to open video system operators and are in the interests of competition. Permitting this recoupment of the gross revenues fee should promote competition on the platform among video programming providers by not disadvantaging any particular video programming provider with respect to the payment of the gross revenues fee. The factual, legal and policy reasons for this approach are described above in Section III.E. This approach will reduce burdens on open video system operators by permitting them to recoup a proportion of these costs from video programming providers. The primary significant alternative we rejected is maintaining our current regulations which may have permitted unaffiliated video programming providers to avoid paying any share of the gross revenues fee; however, as stated, we find that the benefits to open video system operators outweigh the burdens of this approach on video programming providers.

6. *PEG Access Obligations.* Requiring open video system operators to match, rather than share, all public, educational and governmental ("PEG") access financial contributions of the local cable operator may impose burdens on open video system operators, including those that are small entities. These burdens are described in the preceeding section of this FRFA. We find that these burdens are outweighed by the benefits of this revised approach. The factual, policy and legal reasons for this approach are described in Section III.F. We believe that this approach may reduce burdens on open video system operators by providing further certainty as to their PEG access financial obligations. Significant alternatives we rejected include: (1) maintaining our current rules which permit an open video system operator to share the PEG access contributions; (2) requiring an open video system operator to match precisely any in-kind contributions (e.g., cameras); and (3) not requiring open video system operators to share the costs of services, facilities or equipment for PEG access.[559] Generally, we rejected the first alternative because we find that the matching principle more accurately fulfills the 1996 Act's mandate to impose PEG access obligations on open video system operators that are "no greater or lesser" than those imposed on cable operators. We rejected the second because we find that precise duplication would often be unnecessary, wasteful and inappropriate. We rejected the third alternative because we believe that providing support for PEG access services, facilities and equipment is a part of the open video system operator's PEG obligation under Section 611 of the Communications Act.[560]

7. *LFA Election.* Modifying a local franchise authority's ability to make an election concerning the PEG access obligations of an open video system operator, as described in the preceeding section of this FRFA, may impose additional burdens on open video system operators, including those that are small entities. These burdens are described above. However, we find that these burdens are outweighed by the benefits of this approach, which include preventing PEG access obligations from being frozen in perpetuity, thereby providing significant

[559] *Id.*

[560] *Id.*

benefits to local franchise areas and communities. The factual, policy and legal reasons for this approach are described above in Section III.F. This approach may reduce burdens on local communities by permitting them to negotiate with open video system operators with respect to PEG access obligations, and on open video system operators by providing them certainty as to their PEG access obligations for a period of up to 15 years. The primary significant alternative we rejected is maintaining our current regulations which do not permit local franchise areas to make this election;[561] however, as stated, we find that the benefits to local communities outweigh the burdens of this approach on open video system operators.

8. *Must-Carry/Retransmission Consent Election.* The rule which requires a broadcast station to make the same election for open video systems and cable systems in the same geographic area, unless the overlapping open video system is unable to deliver appropriate signals in conformance with the broadcast station's elections for all cable systems serving the same geographic area, may impose a burden on broadcast stations. The policy, factual and legal reasons for adopting this final rule are set forth in Section III.F.2.b. of this Order. The rule adopted in the *Second Report and Order* did not require a broadcast station to make the same election for open video and cable systems serving the same geographic area. The rule adopted in this order promotes parity between open video system operators and cable operators, in accordance with Section 653 of the Communications Act, and may reduce burdens on both open video system operators and television stations by providing further certainty with respect to the must-carry status of television stations.

9. *Must-Carry Copyright.* The rule which requires an open video system operator to pay for any additional copyright fees incurred as a result of carrying a local station beyond its local market area may impose a burden on open video system operators. It has not been necessary to take significant steps to minimize the burden on small open video system operators because we do not believe that this rule is likely to affect many open video systems and especially not smaller open video systems, because it will only apply to open video systems capable of carrying broadcast signals beyond their local service areas. The factual policies and legal reasons for adopting this final rule are set forth in Section III.F.2.b. Any burden on open video system operators is outweighed by the benefit to broadcast stations, especially small stations that might not be able to elect must-carry status if they were subject to copyright fees in distant markets.

10. *Sports Exclusivity.* The rule which holds an open video system operator responsible for any violation of our sports exclusivity rules may impose a burden on open video system operators. This burden is justified by the interest in protecting exclusive rights to sports programming. The factual policies and legal reasons for adopting this final rule are set forth in Section III.F.4.b. The rule adopted in the *Second Report and Order*, did not hold an open video system operator responsible for a violation of the sports exclusivity rules if the operator took prompt steps to delete the programming once it was notified of a violation. The rule adopted in

[561] *Id.*

this order applies our sports exclusivity rules to open video systems more fairly than the Commission's previous rule for the reasons cited in Section III.F.4.b.

11. *Navigational Devices.* Allowing open video system operators to permit programming providers, including those affiliated with the open video system operator, to use their own navigational devices subject to certain conditions may impact open video system operators and their affiliates, including those that are small entities. If an operator permits programming providers, including its affiliate, to develop their own navigational devices, the operator must create an electronic menu or guide containing a non-discriminatory listing of programming providers or programming services available on the system that every programming provider must carry. If an operator creates a system-wide non-discriminatory menu or guide, then its programming affiliate may create its own menu or guide without being subject to the non-discrimination requirements of Section 653(b)(1)(E). The factual and policy reasons for adopting the final rule are found in Section III.G., above. We believe that this rule minimizes burdens on open video system operators and their programming affiliates, by allowing the affiliated programmers the flexibility to develop and use their own navigational devices, guides and menus.

However, under the rule adopted, programming providers cannot be required to use their own navigational devices. Such providers must, upon request, have access to the navigational device used by the open video system operator or its affiliate. As is explained in Section III.G., above, not all programming providers will have the desire or resources to supply their own navigational devices. This may be especially true of smaller video programming providers seeking carriage on the open video system. This requirement can help minimize burdens on small programming providers by allowing them access to the navigational device used by the open video system operator or its affiliate.

12. *Dispute Resolution.* Requiring that the preliminary rate estimate provided by an open video system operator to video programming providers include, upon request, all information needed to calculate the average rate paid by unaffiliated programming providers receiving carriage on the system, including the information needed for any weighting of the individual carriage rates that the operator has included in the average rate, may impose burdens on open video system operator, including those that are small entities. These burdens are described in the preceeding section of this FRFA. However, we find that these burdens are outweighed by the benefits of this clarification, which include providing an unaffiliated video programming provider with relevant information regarding whether to pursue a rate complaint against an open video system operator. The factual, policy and legal reasons are described above in Section III.H. The primary significant alternative rejected by the Commission is to maintain our current rules which do not require a system operator's provision of such information upon request but only in formal discovery; however, as stated, we find that the benefits to unaffiliated video programming providers outweigh the burdens of complying with this rule.

241. *Report to Congress.* The Commission shall send a copy of this FRFA, along with this *Third Report and Order and Second Order on Reconsideration*, in a report to Congress

pursuant to the SBREFA, 5 U.S.C. § 801(a)910(A). A copy of this FRFA will also be published in the Federal Register.

V. PAPERWORK REDUCTION ACT OF 1995 ANALYSIS

242. The requirements adopted in the *Third Report and Order and Second Order on Reconsideration* have been analyzed with respect to the Paperwork Reduction Act of 1995 (the "1995 Act") and found to impose new or modified information collection requirements on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget ("OMB") as prescribed by the 1995 Act. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and OMB to comment on the information collections contained in this *Third Report and Order and Second Order on Reconsideration* as required by the 1995 Act.[562] OMB comments are due 60 days from date of publication of this *Third Report and Order and Second Order on Reconsideration* in the Federal Register. Comments should address: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (2) the accuracy of the Commission's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

243. Written comments by the public on the proposed and/or modified information collections are due on or before 30 days after publication of the *Third Report and Order and Second Order on Reconsideration* in the Federal Register. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed and/or modified information collections on or before 60 days after publication of the *Third Report and Order and Second Order on Reconsideration* in the Federal Register. A copy of any comments on the information collections contained herein should be submitted to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, DC 20554, or via the Internet to dconway@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236, NEOB, 725 -17th Street, N.W., Washington, DC 20503 or via the Internet to fain_t@al.eop.gov. For additional information concerning the information collections contained herein contact Dorothy Conway at 202-418-0217, or via the Internet at dconway@fcc.gov.

VI. ORDERING CLAUSES

244. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 4(j), 303(r), and 653 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 573 the rules, requirements and policies discussed in this *Third Report and Order and Second Order on Reconsideration* ARE ADOPTED and Sections 76.1000 and 76.1500 through 76.1515 of the Commission's rules, 47 C.F.R. §§ 76.1000 and 76.1500 through 1515, ARE AMENDED as set

[562]Pub. L. No. 104-13.

forth below.

245. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), 4(j), 303(r), and 653 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 573 the rules, the Petitions for Reconsideration set forth in Appendix A are GRANTED IN PART and DENIED IN PART, as provided herein.

246. IT IS FURTHER ORDERED that the requirements and regulations established in this decision shall become effective upon approval by OMB of the new information collection requirements adopted herein, but no sooner than 60 days after publication in the Federal Register.

247. IT IS FURTHER ORDERED that the Motion to Accept Late-Filed Opposition filed by the Telephone Joint Petitioners is HEREBY GRANTED.

248. IT IS FURTHER ORDERED that the Secretary shall send a copy of this *Third Report and Order and Second Order on Reconsideration* including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601 *et seq.* (1981).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton

William F. Caton
Acting Secretary

APPENDIX A

List of Parties Filing Petitions for Reconsideration
and Oppositions to Petitions for Reconsideration

Petitions for Reconsideration

Note: Unless otherwise specified, all filings listed below were styled as "Petition for Reconsideration" and are referred to in the text of this Order as "Petition."

Alliance for Community Media; Alliance for Communications Democracy; People for the American Way; Center for Media Education; and Media Access Project Petition for Reconsideration and Clarification (Alliance for Community Media, et al.)
Association of Local Television Stations, Inc. (ALTV)
AT&T Corporation (AT&T)
Bell Atlantic Telephone Companies and Bell Atlantic Video Services Company; BellSouth Corporation and BellSouth Telecommunications, Inc.; GTE Service Corporation and affiliated domestic telephone companies and GTE Media Ventures, Inc.; Lincoln Telephone and Telegraph Company; Pacific Bell; and SBC Communications, Inc. and Southwestern Bell Telephone Company (Telephone Joint Petitioners)
City of Indianapolis, IN (City of Indianapolis)
Comcast Cable Communications, Inc. (Comcast)
Cox Communications, Inc. (Cox)
ESPN, Inc. (ESPN)
Metropolitan Dade County (Dade County)
MCI Telecommunications Corp. (MCI)
Michigan; Illinois; and Texas Communities (Michigan Cities, et al.)
Municipal Administrative Services, Inc.; David M. Griffith & Associates; and Lloyd, Gosselink, Fowler, Blevins & Matthews, P.C. (Municipal Services, et al.)
National Cable Television Association, Inc. (NCTA)
NYNEX Corporation (NYNEX)
Office of the Commissioner of Baseball; National Basketball Association; National Football League; and National Hockey League Request for Clarification or, in the Alternative, Petition for Reconsideration (Joint Sports Petitioners)
Rainbow Programming Holdings, Inc. (Rainbow)
Tele-TV
U S West, Inc. Petition for Clarification (U S West)
Village of Schaumburg, IL Comments in Opposition to Certain Portions of FCC Second Report and Order (Village of Schaumburg)

Oppositions to Petitions for Reconsideration

Note: All filings listed below are referred to in the text of this Order as "Opposition."

Alliance for Community Media; Alliance for Communications Democracy; and Center for Media Education Opposition to Petition for Reconsideration (Alliance for Community Media, et al.)

Association of Local Television Stations, Inc. Opposition to Petition for Reconsideration (ALTV)

Bell Atlantic Telephone Companies and Bell Atlantic Video Services Company; BellSouth Corporation and BellSouth Telecommunications, Inc.; GTE Service Corporation and affiliated domestic telephone companies and GTE Media Ventures, Inc.; Lincoln Telephone and Telegraph Company; Pacific Bell; and SBC Communications, Inc. and Southwestern Bell Telephone Company Opposition to Petitions for Reconsideration (Telephone Joint Petitioners)

Cablevision Systems Corporation Comments on the Petition for Reconsideration of the National Cable Television Association (Cablevision Systems)

MFS Communications Company, Inc. Opposition to Petitions for Reconsideration (MFS Communications)

Michigan; Illinois; and Texas Communities, Reply to Petitions for Reconsideration (Michigan Cities, et al.)

Motion Picture Association of America, Inc. Comments on Petitions for Reconsideration (MPAA)

National Cable Television Association, Inc. Opposition to Petitions for Reconsideration (NCTA)

National Association of Telecommunications Officers and Advisors Opposition to Petitions for Reconsideration (NATOA)

National League of Cities; United States Conference of Mayors; National Association of Counties; Montgomery County, MD; and the City of Los Angeles, CA (National League of Cities, et al.)

NYNEX Corporation Opposition to Petition for Reconsideration (NYNEX)

Residential Communications Networks, Inc. Opposition to Petitions for Reconsideration (RCN)

Sprint Local Telephone Companies, Comments of the (Sprint)

Staff of the Federal Trade Commission and the Antitrust Division of the Department of Justice Comments in Opposition to Petitions for Reconsideration (FTC and DOJ Antitrust Division)

Tele-TV Opposition to Petitions for Reconsideration Regarding Application of Program Access Rules to OVS and Incumbent Cable Operators' Use of OVS Capacity (Tele-TV)

United States Telephone Association Opposition and Comments to Certain Petitions for Reconsideration (USTA)

U S West, Inc. Opposition to Petitions for Reconsideration (U S West)

Comments in the *Cable Reform Proceeding*

Alliance for Community Media, Consumer Project on Technology and Alliance for Communications Democracy (Alliance for Community Media, et al.)
Bell Atlantic Telephone Companies and Bell Atlantic Video Services Companies (Bell Atlantic)
BellSouth Corporation (BellSouth)
City and County of Denver, Colorado (City of Denver)
National League of Cities and the National Association of Telecommunications Officers and Advisors (National League of Cities, et al.)
Residential Communications Network, Inc. (RCN)
Time Warner Cable (Time Warner)
United States Telephone Association (USTA)

Reply Comments in the *Cable Reform Proceeding*

Michigan, Illinois, and Texas Communities (Michigan Cities, et al.)
National League of Cities; United States Conference of Mayors; National Association of Counties; National Association of Telecommunications Officers and Advisors; Montgomery County, Maryland; City of Los Angeles, California; City of Chillicothe, Ohio; City of Dearborn, Michigan; City of Dubuque, Iowa; City of St. Louis, Missouri; City of Santa Clara, California; and City of Tallahassee, Florida (National League of Cities, et al.)
U S West, Inc. (U S West)

APPENDIX B

Rule Changes

Part 76 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 76 -- CABLE TELEVISION SERVICE

1. The authority citation for Part 76 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Section 76.1500 is amended by redesignating paragraph (g) as paragraph (h) and adding new paragraph (g) to read as follows:

* * * * *

(g) Affiliate. For purposes of determining whether a party is an "affiliate" as used in this subpart, the definitions contained in the notes to Section 76.501 shall be used, provided, however that:

(1) The single majority shareholder provisions of Note 2(b) to Section 76.501 and the limited partner insulation provisions of Note 2(g) to Section 76.501 shall not apply; and

(2) The provisions of Note 2(a) to Section 76.501 regarding five (5) percent interests shall include all voting or nonvoting stock or limited partnership equity interests of five (5) percent or more.

(h) Other terms. Unless otherwise expressly stated, words not defined in this part shall be given their meaning as used in Title 47 of the United States Code, as amended, and, if not defined therein, their meaning as used in Part 47 of the Code of Federal Regulations.

* * *

3. Section 76.1502 is amended by revising paragraphs (c)(6) and (d) and by adding paragraph (e) to read as follows:

* * * * *
* * * * *
(c) * * *

(6) A list of the names of the anticipated local communities to be served upon completion of the system;

* * *

(d) On or before the date an FCC Form 1275 is filed with the Commission, the applicant must serve a copy of its filing on all local communities identified pursuant to paragraph (c)(6) and must include a statement informing the local communities of the Commission's requirements in paragraph (e) for filing oppositions and comments. Service by mail is complete upon mailing, but if mailed, the served documents must be postmarked at least three days prior to the filing of the FCC Form 1275 with the Commission.

(e) Comments or oppositions to a certification must be filed within five days of the Commission's receipt of the certification and must be served on the party that filed the certification. If the Commission does not disapprove certification within ten days after receipt of an applicant's request, the certification will be deemed approved. If disapproved, the applicant may file a revised certification or refile its original submission with a statement addressing the issues in dispute. Such refilings must be served on any objecting party or parties and on all local communities in which the applicant intends to operate.

4. Section 76.1503 is amended by deleting paragraph (c)(2)(iv)(C) and adding paragraph (c)(2)(v) to read as follows:

* * * * *
* * * * *

(c) * * *

(2) * * *

(iv) Notwithstanding the foregoing, an operator of an open video system may:

(A) Require video programming providers to request and obtain system capacity in increments of no less than one full-time channel; however, an operator of an open video system may not require video programming providers to obtain capacity in increments of more than one full-time channel; and

(B) Limit video programming providers from selecting the programming on more capacity than the amount of capacity on which the system operator and its affiliates are selecting the programming for carriage.

(v) Notwithstanding the general prohibition on an open video system operator's

discrimination among video programming providers contained in paragraph (a) of this section, a competing, in-region cable operator or its affiliate(s) that offers cable service to subscribers located in the service area of an open video system shall not be entitled to obtain capacity on such an open video system, except:

(A) Where the operator of an open video system determines that granting access to the competing, in-region cable operator is in its interests; or

(B) Where a showing is made that facilities-based competition will not be significantly impeded.

Note to paragraph (c)(2)(v)(B): The Commission finds that facilities-based competition will not be significantly impeded, for example, where: (1) the competing, in-region cable operator and affiliated systems offer service to less than 20% of the households passed by the open video system; and (2) the competing, in-region cable operator and affiliated systems provide cable service to a total of less than 17,000 subscribers within the open video system's service area.

* * * * *

Section 76.1504 is amended by revising paragraph (e) and adding paragraphs (e)(1) and (2) to read as follows:

(e) Determining just and reasonable rates subject to complaints pursuant to the imputed rate approach or other market based approach. Carriage rates subject to complaint shall be found just and reasonable if one of the two following tests are met:

(1) The imputed rate will reflect what the open video system operator, or its affiliate, "pays" for carriage of its own programming. Use of this approach is appropriate in circumstances where the pricing is applicable to a new market entrant (the open video system operator) that will face competition from an existing incumbent provider (the incumbent cable operator), as opposed to circumstances where the pricing is used to establish a rate for an essential input service that is charged to a competing new entrant by an incumbent provider. With respect to new market entrants, an efficient component pricing model will produce rates that encourage market entry. If the carriage rate to an unaffiliated program provider surpasses what an operator earns from carrying its own programming, the rate can be presumed to exceed a just and reasonable level. An open video system operator's price to its subscribers will be determined by several separate costs components. One general category are those costs related to the creative development and production of programming. A second category are costs associated with packaging various programs for the open video system operator's offering. A third category related to the infrastructure or engineering costs identified with building and maintaining the open video system. Contained in each is a profit allowance attributed to the economic value of each component. When an open video system operator provides only carriage through its infrastructure, however, the programming and packaging flows from the independent program

provider, who bears the cost. The open video system operator avoids programming and packaging costs, including profits. These avoided costs should not be reflected in the price charged an independent program provider for carriage. The imputed rate also seeks to recognize the loss of subscribers to the open video system operator's programming package resulting from carrying competing programming.

.Note to paragraph (e)(1): Examples of specific "avoided costs" include (a) all amounts paid to studios, syndicators, networks or others, including but not limited to payments for programming and all related rights; (b) packaging, including marketing and other fees; (c) talent fees; (d) a reasonable overhead allowance for affiliated video service support.

(2) An open video system operator can demonstrate that its carriage service rates are just and reasonable through other market based approaches.

6. Section 76.1505 is amended by revising paragraphs (d)(1), (d)(4), (d)(6) and (d)(8) to read as follows:

* * * * *

(d) * * * * *

(1) The open video system operator must satisfy the same public, educational and governmental access obligations as the local cable operator by providing the same amount of channel capacity for public, educational and governmental access and by matching the local cable operator's annual financial contributions towards public, educational and governmental access services, facilities and equipment that are actually used for public, educational and governmental access services, facilities and equipment. For in-kind contributions (e.g., cameras, production studios), the open video system operator may satisfy its statutory obligation by negotiating mutually agreeable terms with the local cable operator, so that public, educational and governmental access services to the community is improved or increased. If such terms cannot be agreed upon, the open video system operator must pay the local franchising authority the monetary equivalent of the local cable operator's depreciated in-kind contribution, or, in the case of facilities, the annual amortization value. Any matching contributions provided by the open video system operator must be used to fund activities arising under Section 611 of the Communications Act.

* * * * *

(4) The costs of connection to the cable operator's public, educational and governmental access channel feed shall be borne by the open video system operator. Such costs shall be counted towards the open video system operator's matching financial contributions set forth above.

* * * * *

(6) Where there is no existing local cable operator, the open video system operator must make a reasonable amount of channel capacity available for public, educational and governmental use, as well as provide reasonable support for services, facilities and equipment relating to such public, educational and governmental use. If a franchise agreement previously existed in that franchise area, the local franchising authority may elect either to impose the previously existing public, educational and governmental access obligations or determine the open video system operator's public, educational and governmental access obligations by comparison to the franchise agreement for the nearest operating cable system that has a commitment to provide public, educational and governmental access and that serves a franchise area with a similar population size. The local franchising authority shall be permitted to make a similar election every 15 years thereafter. Absent a previous franchise agreement, the open video system operator shall be required to provide channel capacity, services, facilities and equipment relating to public, educational and governmental access equivalent to that prescribed in the franchise agreement(s) for the nearest operating cable system with a commitment to provide public, educational and governmental access and that serves a franchise area with a similar population size.

Note to paragraph (d)(6): This subsection shall apply, for example, if a cable operator converts its cable system to an open video system under section 76.1501 of these rules.

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(8) The open video system operator and/or the local franchising authority may file a complaint with the Commission, pursuant to our dispute resolution procedures set forth in section 76.1514, if the open video system operator and the local franchising authority cannot agree as to the application of the Commission's rules regarding the open video system operator's public, educational and governmental access obligations under this subsection (d).

7. Section 76.1506 is amended by revising paragraphs (d), (l)(3) and (m)(2) to read as follows:

(d) Definitions applicable to the must-carry rules. Section 76.55 shall apply to all open video systems in accordance with the provisions contained in this section. Any provision of Section 76.55 that refers to a "cable system" shall apply to an open video system. Any provision of section 76.55 that refers to a "cable operator" shall apply to an open video system operator. Any provision of section 76.55 that refers to the "principal headend" of a cable system as defined in section 76.5(pp) shall apply to the equivalent of the principal headend of an open video system. Any provision of section 76.55 that refers to a "franchise area" shall apply to the service area of an open video system. The provisions of Section 76.55 that permit cable operators to refuse carriage of signals considered distant signals for copyright purposes shall not apply to open video system operators. If an open video system operator cannot limit its distribution of must-carry signals to the local service area of broadcast stations as used in 17 U.S.C. § 111(d), it will be liable for any increase in copyright fees assessed for distant signal carriage under 17 U.S.C.

§ 111.

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(l)***

(3) Television broadcast stations are required to make the same election for open video systems and cable systems serving the same geographic area, unless the overlapping open video system is unable to deliver appropriate signals in conformance with the broadcast station's elections for all cable systems serving the same geographic area.

***

(m)***

(2) Notification of programming to be deleted pursuant to this section shall be served on the open video system operator. The open video system operator shall make all notifications immediately available to the appropriate video programming providers on its open video system. Operators may effect the deletion of signals for which they have received deletion notices unless they receive notice within a reasonable time from the appropriate programming provider that the rights claimed are invalid. The open video system operator shall not delete signals for which it has received notice from the programming provider that the rights claimed are invalid. An open video system operator shall be subject to sanctions for any violation of these rules. An open video system operator may require indemnification as a condition of carriage for any sanctions it may incur in reliance on a programmer's claim that certain exclusive or non-duplication rights are invalid.

***

8. Section 76.1511 is amended to read as follows:

An open video system operator may be subject to the payment of fees on the gross revenues of the operator for the provision of cable service imposed by a local franchising authority or other governmental entity, in lieu of the franchise fees permitted under Section 622 of the Communications Act. Local governments shall have the authority to assess and receive the gross revenue fee. Gross revenues under this paragraph means all gross revenues received by an open video system operator or its affiliates, including all revenues received from subscribers and all carriage revenues received from unaffiliated video programming providers. In addition gross revenues under this paragraph includes any advertising revenues received by an open video system operator or its affiliates in connection with the provision of video programming, where such revenues are included in the calculation of the incumbent cable operator's cable franchise fee. Gross revenues does not include revenues collected by unaffiliated video programming providers, such as subscriber or advertising revenues. Any gross revenues fee that the open video

system operator or its affiliate collects from subscribers or video programming providers shall be excluded from gross revenues. An operator of an open video system or any programming provider may designate that portion of a subscriber's bill attributable to the fee as a separate item on the bill. An operator of an open video system may recover the gross revenue fee from programming providers on a proportional basis as an element of the carriage rate.

9. Section 76.1512 is revised to read as follows:

§ 76.1512 Programming information.

* * * * *

(b) In accordance with paragraph (a) of this section:

(1) An open video system operator shall not discriminate in favor of itself or its affiliate on any navigational device, guide or menu;

(2) An open video system operator shall not omit television broadcast stations or other unaffiliated video programming services carried on the open video system from ya navigational device, guide (electronic or paper) or menu;

(3) An open video system operator shall not restrict a video programming provider's ability to use part of the provider's channel capacity to provide an individualized guide o menu to the provider's subscribers;

(4) Where an open video system operator provides no navigational device, guide or menu, its affiliate's navigational device, guide or menu shall be subject to the requirements of Section 653(b)(1)(E) of the Communications Act;

(5) An open video system operator may permit video programming providers, including its affiliate, to develop and use their own navigational devices. If an open video system operator permits video programming providers, including its affiliate, to develop and use their own navigational devices, the operator must create an electronic menu or guide that all video programming providers must carry containing a non-discriminatory listing of programming providers or programming services available on the system and informing the viewer how to obtain additional information on each of the services listed;

(6) An open video system operator must grant access, for programming providers that do not wish to use their own navigational device, to the navigational device used by the open video system operator or its affiliate;

(7) If an operator provides an electronic guide or menu that complies withparagraph (5) of this subsection, its programming affiliate may create its own menu or guide without being subject to the requirements of Section 653(b)(1)(E) of the Communications Act.

(c) An open video system operator shall ensure that video programming providers or copyright holders (or both) are able to suitably and uniquely identify their programming services to subscribers.

(d) An open video system operator shall transmit programming identification without change or alteration if such identification is transmitted as part of the programming signal.

* * *

10. Section 76.1513 is amended by adding a note to paragraph (e)(viii) to read as follows:

* * * * *

(e) * * *

(viii) * * *

Note to paragraph (e)(viii): Upon request by a complainant, the preliminary carriage rate estimate shall include a calculation of the average of the carriage rates paid by the unaffiliated video programming providers receiving carriage from the open video system operator, including the information needed for any weighting of the individual carriage rates that the operator has included in the average rate.

* * *

11. Section 76.1514 is revised to read as follows:

* * * * *

(2) Any local exchange carrier offering such a package must impute the unbundled tariff rate for the regulated service.

* * *

APPENDIX C

INSTRUCTIONS FOR FCC FORM 1275
OPEN VIDEO SYSTEM CERTIFICATION OF COMPLIANCE

Purpose of this Form

Section 653(a)(1) of the Communications Act, 47 U.S.C. § 573(a)(1), provides that an open video system operator must certify to the Commission that it complies with the Commission's regulations under Section 653(b) of the Communications Act, 47 U.S.C. § 573(b). This FCC Form 1275 is to be used by an open video system applicant to obtain certification from the Commission. The Commission will publish notice of the receipt of FCC Form 1275 and will post the Form on its Internet site. The certification will be deemed approved if the Commission does not disapprove the certification within ten days of the Commission's receipt of the filing.

Please be sure to review all relevant FCC regulations and these instructions before completing this Form.

Filing Information

A hard copy of FCC Form 1275 and all attachments must be filed with the Office of the Secretary, Federal Communications Commission, 1919 M Street N.W., Room 222, Washington D.C., 20554, and with the Office of the Bureau Chief, Cable Services Bureau, 2033 M Street, N.W., Washington, D.C. 20554. The applicant must also file the Form 1275 on computer disk at these same two locations. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible form using Windows 3.1 and Excel 4.0 software. The diskettes should be submitted in "read only" mode. The diskettes should be clearly labelled as an open video system certification filing, should indicate the applicant's name and date of submission, and should be accompanied by a cover letter. Any attachments or other material not easily stored on computer disk may be filed in hard copy only.

On or before the date the Form 1275 is filed with the Commission, the applicant must serve a copy of its filing on all local communities listed in Module D, Line 1 of the Form. The applicant must include a statement informing the local communities that any oppositions or comments must be filed with the Commission within five days of the applicant's filing and must be served on the applicant. Service by mail is complete upon mailing, but if mailed, the served documents must be postmarked at least three days prior to the date the applicant files the Form 1275.

Instructions

Module A: Company Information. Indicate the applicant's name, address, telephone and fax numbers and the name of a person to contact for further information.

Module B: Ownership Information. Attach a statement of ownership interest in the open video

system, including all affiliated entities.

Module C: Eligibility and Compliance Representations.

Line 1: If you are a cable operator applying for certification to operate within your cable franchise area, indicate whether you are qualified to become an open video system operator under Section 76.1501 of the Commission's rules. You must also attach a brief statement explaining how you qualify under Section 76.1501. Section 76.1501 provides that a cable operator is qualified to operate within its cable franchise area if it is subject to "effective competition" in the franchise area, as defined in Section 623(l)(1) of the Communications Act, 47 U.S.C. § 543(l)(1). If a cable operator is not subject to effective competition in its cable franchise area, it may still qualify to operate an open video system under Section 76.1501, provided that the Commission has issued a finding that such operation would serve the public interest, convenience, and necessity. If you are not a cable operator applying for certification within your cable franchise area, check "N/A" to indicate that the question is not applicable.

Line 2: Indicate whether you agree to comply with Sections 76.1503, 76.1504, 76.1506(m), 76.1508, 76.1509, and 76.1513 of the Commission's rules, implementing Section 653(b) of the Communications Act. In certifying compliance with these regulations, you agree to abide by the Commission's requirements regarding non-discriminatory carriage; just and reasonable rates, terms and conditions; a one-third capacity limit on the amount of activated channel capacity on which an open video system operator may select programming when demand for carriage exceeds system capacity; channel sharing; application of the rules concerning sports exclusivity, network non-duplication, and syndicated exclusivity; and non-discriminatory treatment in presenting information to subscribers.

Line 3: Indicate whether you agree to comply with the Commission's requirements for enrollment of and for notice to unaffiliated video programming providers.

Line 4: If you are required under Section 64.903(a) of the Commission's rules to file a cost allocation manual, indicate whether you agree to file changes to your cost allocation manual at least 60 days before the commencement of service. If you are not required under Section 64.903(a) to file a cost allocation manual, check "N/A" to indicate that the question is not applicable.

Module D: System Information.

Line 1: List the names of the anticipated local communities to be served upon completion of your open video system. If the space provided on the form is insufficient, attach additional sheets as necessary.

Line 2: Indicate the amount of digital capacity anticipated on the open video system.

Line 3: Indicate the amount of analog capacity anticipated on the open video system.

Line 4: For switched digital systems, indicate the anticipated number of available channel input ports.

Module E: Verification Statement.

An officer or director of the applicant must sign and date Form 1275 certifying that, to the best of his or her information and belief, all representations contained in the filing are accurate according to the most recent information available.

FCC NOTICE TO INDIVIDUALS REQUIRED BY THE PRIVACY ACT AND THE PAPERWORK REDUCTION ACT

The solicitation of personal information in this form is authorized by the Communications Act of 1934, as amended. The information provided in this form is used by the Commission to determine that open video system operators comply with the Commission's regulations under Section 653(b) of the Communications Act. In reaching that determination, or for law enforcement purposes, it may become necessary to provide personal information contained in this form to another government agency. If information requested on this form is not provided, processing may be delayed. All information provided in this form will be available for public inspection. Your response is required to obtain the requested certification. Individuals are not required to respond to a collection of information unless it displays a currently valid OMB control number.

Public reporting burden for this information is estimated to average one hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Federal Communications Commission, Records Management Division, Washington, D.C. 20554. **Do not send completed forms to this address.**

Federal Communications Commission
Washington, D.C. 20554

Approved by OMB XXXX-XXXX

FCC FORM 1275
CERTIFICATION FOR OPEN VIDEO SYSTEMS

A. Company Information

Company Name:		
Contact Person:		
Mailing Address:		
City:	State:	Zip Code:
Phone Number:	Fax Number:	

B. Attach a statement of ownership, including all affiliated entities.

C. Eligibility and Compliance Representations

	Yes	No	N/A
1. If you are a cable operator applying for certification within your cable franchise area, are you qualified to operate an open video system under 47 C.F.R. § 76.1501?			
2. Do you agree to comply and to remain in compliance with each of the Commission's regulations in 47 C.F.R. §§ 76.1503, 76.1504, 76.1506(m), 76.1508, 76.1509, and 76.1513?			
3. Do you agree to comply with the Commission's notice and enrollment requirements for unaffiliated video programming providers?			
4. If applicable, do you agree to file changes to your cost allocation manual at least 60 days before the commencement of service?			

D. System Information

1. List the names of the anticipated local communities to be served upon completion of the system.

2. Anticipated Digital Capacity:			3. Anticipated Analog Capacity:		
4. If Switched Digital, Anticipated Number of Channel Input Ports:					

E. Verification Statement

WILLFUL FALSE STATEMENTS MADE ON THIS FORM ARE PUNISHABLE BY FINE AND/OR IMPRISONMENT (U.S. CODE TITLE 18, SECTION 1001), AND/OR FORFEITURE (U.S. CODE, TITLE 47, SECTION 503)

To the best of my knowledge and belief, the representations made herein are accurate according to the most recent information available.

Name:	Signature:
Title:	Date: